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The JOURNAL takes pleasure in announcing the appointment to the Editorial Board of the following men: from the Graduate Class, George Richard Holahan, Jr., M.L., St. Lawrence University, 1908, of Brooklyn, N. Y.; from the Senior Class, Henry Ralph Ringe, B.S., University of Pennsylvania, 1906, of Three Tuns, Pa., and David Arthur Wilson of Hartford, Conn.

## THE LIABILITY OF BOARDS OF HEALTH.

The growing authority constantly being delegated to public commissions has made the powers and the liabilities of such bodies extremely important to the community. Boards of health were among the first commissions created by the legislatures to subserve the people's interests, and we should therefore expect to find the law as to the personal liability of their members completely settled. Unfortunately this is not the case. Certain courts looking to the welfare of their citizens, base their decisions upon the principle that statutes protecting health are the highest law of the land, and that "whenever a public regulation is reasonably demonstrated to be a promoter of health all constitutionally guaranteed gifts must give way to be sacrificed without compensation." *2 Tiedman, State and Federal Control of Property,* Sect. 169. In supporting this radical as well as harsh

theory, such courts have sometimes sacrificed the rights of individuals with a view to conferring benefits on the body politic.

It is following this principle that the Court of Errors and Appeals of New Jersey, in the case of *Valentine v. The City of Englewood,* 71 Atl. 344, recently held: The members of a board of health, acting in the performance of a public duty under a public statute to prevent the spread of an infectious or contagious disease, are not personally liable in a civil action for damages arising out of their acts in establishing a quarantine even where the disease does not exist, provided they act in good faith.

The suit arose from the action of the board in quarantining the plaintiff's house under the belief that his daughter had contracted scarlet fever, when in reality she was suffering from some minor ailment. In its facts, the case was very similar to *Beeks v. Dickinson County,* 131 Ia. 244, in which the court laid down the same principle where a person, who was erroneously supposed to have smallpox and therefore quarantined, later sued for the damages suffered. The New Jersey court did, however, act under a statute which forbade actions against the board unless want of reasonable care could be shown, but the attitude taken is shown by the statement: "The exemption of officers from liability extends only to matters in which they have jurisdiction under the statute, and it may be said that the board of health has no jurisdiction unless a cause for disease actually exists. This view is too narrow. . . . It is enough if the matter is colorably though not really in their jurisdiction." Thus, the New Jersey court viewed the facts from the same standpoint and reached the same conclusion that the Iowa court did in *Beeks v. Dickinson County, supra,* where no such statute existed.

As a municipality by recognized authority is not liable for the acts of a board of health, the ability of board members to escape suit for damages has the result of denying power to the party injured by such regulations to obtain ordinary redress. *Ogg v. City of Lansing,* 35 Ia. 495. In the case under consideration, the court suggests appealing to the state for compensation, but those acquainted with legislative conditions in this country will recognize how generally futile such an attempt would be. The decision of this case and of *Beeks v. Dickinson County, supra,* are of vital interest, as holding that individuals who have suffered damages through the mistake of health boards are practically to be denied compensation for their injuries.

The New Jersey court argues that to make health boards liable for acts done in good faith, but because of mistaken belief will tend to make them over-cautious in their duties and to impair their efficiency. It is also claimed that as the board is acting for the state on the principle of agency, the state alone should be held. Undoubtedly this is sound reasoning, but it is not sufficient to carry the theory of non-liability of such officers to any length. Where discretion is given to purely judicial authorities or to quasi-judicial bodies like highway officers and health boards, it is acknowledged that the law must to a certain extent protect them if their work is to be properly done. *Daniels v. Hathaway,* 65 Vt. 247. So a health officer authorized to take action for the prevention of the spread of disease, is not liable for injuries resulting from such reasonable and customary measures as he may in good faith adopt or direct for that purpose with regard to persons or matters in his jurisdiction. *Whidden v. Cheever,* 69 N. H. 142. Thus, a board of health was held not liable for the removal of the wall paper in a room in which a smallpox patient had been confined, though it was admitted to be questionable whether the board's action aided in protecting the health of the city. *Seavey v. Preble,* 64 Me. 120. How far this immunity to quasi-judicial officers is carried, is shown by the fact that some courts hold them not liable even when actuated by malice and this is declared by Mr. Mechem to be the better rule. *Mechem Public Officers,* Sect. 640.

This freedom from liability is however limited by the jurisdiction and beyond this the exemption of quasi-judicial officers from liability does not extend. When acting beyond their jurisdiction, the officer is as much out of the protection of the law in respect to that act, as if he held no office at all. *Cooley on Torts,* p. 379. It makes no difference whether the quasi-judicial officer knew he was acting *ultra vires* or not. As was said by the Supreme Court of Wisconsin in a case holding that the discretion of highway officers was limited by the rights of individuals, and that when they invaded those rights the officers became personally liable. This rule, sometimes, when the agent has acted in good faith and without knowledge of legal authority may seem to operate oppressively, but it is a necessity and a very just rule notwithstanding, and the full protection of the citizen in his legal rights would be impossible without it. Absence of bad faith can never excuse a trespass, though the existence of bad faith may

sometimes aggravate it. *Cubit v. O'Dett,* 51 Mich. 351. The same rule has been applied to health boards. Where in a clear case of unwarranted authority, the members of a health commission roped off part of the plaintiff's land in order to bring it within the hospital grounds, they were held liable. *Barry v. Smith,* 199 Mass. 78.

It is difficult to understand why the two arguments advanced in *Valentine v. The City of Englewood,* apply to a further extension of this well recognized doctrine. The members of the board are not agents of the state when they do acts which are not authorized by the legislature, and it seems unlikely that they will pursue a different course from other public officers and fail to do their duty because they will be held liable for exceeding their powers. Nevertheless, the New Jersey court does extend the usual limits of the rule upon the theory that the health officers were colorably in their jurisdiction and were therefore protected. To support this holding a New Jersey case giving similar protection to a justice of the peace is cited. *Grove v. Van Dyne,* 44 N. J. Law 654. This immunity to justices of the peace has been given in a few states, the Maine courts basing their decision upon the ground that "such erroneous decision is a judicial one for which a justice is not liable." *Rush v. Buckley,* 100 Me. 322. That this is not a thoroughly settled principle is shown by the dissenting opinion to the case of Justice, now Chief Justice Emery, which characterized the doctrine as "impairing the right of personal liberty and subversive of long established rules of the state." If it is threatening to thus extend the powers of justices, how much more dangerous is it to so increase the authority of public bodies like boards of health? If good faith is to be the test of the jurisdiction of commissions constituted by the legislature, then at once private property and personal rights are subject to distruction through the ignorance of boards.

Fortunately, however, as contrasted with this radical view, a number of state courts hold that unjustified interference by health boards will render the members personally liable. This principle was recently expressed by the New York Supreme Court in a case where the selling of milk was interfered with. "The right to carry on the business of selling milk is a constitutional one. This right can only be interfered with in the exercise of the police power of the state because, in the manner of his conduct of the business or the circumstances surrounding it, the public health is

imperiled. If, as a matter of fact, the public health is not imperiled, the summary determination of the board of health does not make it so; and its interference with his business would subject the persons constituting the board to the same perils and liabilities as an individual who interfered with a lawful business." *People v. Dept. of Health*, 51 Miscl. N. Y. 190. The court is simply following out the doctrine well established in New York, that whoever abates an alleged nuisance and thus destroys and injures private property or interferes with private rights, whether he is a public health officer or a private person, unless he acts under the judgment or order of the court having jurisdiction, does so at his peril; and when his act is challenged in regular judicial tribunals, to protect him it must appear that the thing abated was in fact a nuisance. *People v. Board of Health*, 140 N. Y. 1. The same view has been held in *Miller v. Horton*, 152 Mass. 540; *Pearson v. Zehr*, 138 Ill. 48, and in *Lowe v. Conroy*, 120 Wis. 151. The rights of a man whose property has been destroyed and one whose property is injured and whose personal rights have been invaded are hardly to be distinguished. Indeed, the New Jersey court cites as resting on the same grounds, *Raymond v. Valentine*, 51 Conn. 81, where property actually was destroyed by an over-zealous board of health and where no recovery was allowed.

Very little seems to be gained by the theory of non-liability of health boards, even where the fourteenth amendment of the Constitution requiring due process of law is not infringed upon. Nothing is gained in time because health boards may always act immediately on property and later hold a hearing to determine whether their action was justified. *Cold Storage Co. v. Chicago*, 211 U. S. 306. The increase in the efficiency of the board is at least questionable, and if the legislature fears that the board members will be less active if responsible for their own mistakes, the city can be made liable or some other form of redress given. On the other hand, if no right against the board is allowed and none against the municipality is authorized, the consequences are most serious. The personal and property rights of a private citizen may be heedlessly invaded and be left without adequate remedy. This condition of things is of course limited by the fourteenth amendment, but great harm may be done within the wide police powers accredited to the state over matters of health. Even more serious is the danger of giving such powers to other boards. If

the health board members are to escape liability, are the members of the city transit commissions to be held liable? Public service commissions, railroad commissions and numerous other boards with great and small powers, are to-day rapidly being created in accordance with our modern theories of government. To be permanently successful these boards must conform in their powers and liabilities to the acknowledged and equitable principles of the law. No legal principle is more firmly established than that where there is a right there is a remedy. To permit property to be taken or personal privileges to be infringed upon where there is no justification except the well-meant ignorance of public officers, is in denial of such a right.

## STARE DECISIS IN CRIMINAL LAW.

In a recent decision by the Supreme Court of North Carolina in the case of *State v. Fulton*, 63 S. E. 145, it was held that a husband was indictable for slandering his wife under section 3640 (1905 Revisal) of the code which provided that: "If any person shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman by words written or spoken, which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor." This decision directly overruled the case of *State v. Edens*, 95 N. C. 693. The judge who gave the deciding vote relied upon the doctrine as laid down by the same court in *State v. Bell*, 136 N. C. 674, where it had been decided that a tenant was indictable for the removal of crops without giving the landlord five days' notice, and that he, the tenant, could not show in defense that he had sustained damage to the amount of the rent due by the failure of the landlord to comply with the contract. At the same time particular attention was called to *stare decisis* in relation to criminal law. In the case of *State v. Bell, supra*, the court had overruled a former decision of the same court, interpreting the penal statute, as laid down in *State v. Neal*, 129 N. C. 692, and applied the rule so that a new trial was ordered, but it was to be conducted under the law as declared in the overruled decision. Connor, J., said: "In view of the peculiar conditions with which we are dealing, we have deemed it but just to the defendants, and not at variance with any authority in this court, to order a new trial, with the direction that the testimony offered in this case, insofar as it is

made admissible by the ruling of this court in *State v. Neal,* be admitted. If the defendants shall be able to establish their defense in accordance with the ruling in Neal's case, they are entitled to do so, but the construction now put upon the statute will be applied to all future cases. While, as we have said, we find no authority directly in point, we think this course is sustained by what is said in *Wells on Stare Decisis,* 566."

In the statement of what is *stare decisis,* text writers and courts are well agreed. It is simply a doctrine of following established precedents and adhering to instituted principles. Although the doctrine is well-settled as applicable in affecting vested contractual rights, yet there is a paucity of decisions upon the subject in connection with the criminal law. The subject was slightly touched upon by the notorious Jeffries in *Roswell's Case,* 10 How. St. Tr. 147, 267. In the case of *Lanier v. State,* 57 Miss. 107, in an action of assault, the court said: "The doctrine of *stare decisis* in criminal cases cannot be carried to the extent of allowing to violators of law a vested interest in rules which have been erroneously sanctioned." The court then overruled *Smith v. State,* 39 Miss. 521, also a case of assault, and laid down the true doctrine. But, what the court now (in *Lanier v. State*) calls the true doctrine, was inconsistent, not with the decision in *Smith v. State,* but merely with a *dictum* therein, in the laying down of which the previous court had gone farther than the facts had warranted. For it is a well-established principle that, "the doctrine of *stare decisis* is not applicable to *dicta* found in opinions of the court." *Friedman v. Suttle,* 85 Pac. 726. Furthermore, it has been held: "The Supreme Court will not follow the line marked out by a single precedent, placing its decision on the rule of *stare decisis* alone, without regard to the ground on which such case was adjudged." *State v. Williams,* 13 S. C. 546. The mere fact that there has been at sometime in the past a decision upon similar facts should not be sufficient to invoke *stare decisis* in criminal law more so than it would where there was a vested right involved. In order that "the rule of *stare decisis* can be forcefully invoked, there must be three elements which enter into the authority of the case, First, the unanimity with which its judgment was pronounced; second, the fact that it has been followed, and third, the duration of time during which it has been openly followed or tacitly assented to." *State v. Williams, (supra)* 554. It was only recently held: The decision that the giving of

a charge that the jury in considering the testimony of the accused, may consider his position and interest, will in the future be ground for a reversal, rendered after the court had several times criticised such a charge as violating the Constitution, declaring that judges shall not charge with respect to matter of fact, should not be applied to a case tried before the decision, and the giving of such a charge before that time is not ground for reversal. *People v. Ryan,* 152 Cal. 364.

It is remarkable that *stare decisis* has not played more of a definite part in our criminal law. It has been a factor in a certain vague sense, but forceful utterances from the bench upon the point are few and far between. It is but reasonable that wrong decisions in criminal law should be overruled, but there should be exceptions even to this rule. When we find a wrong merely *malum prohibitum,* forbidden by a statute, it is but just that one should be allowed to act under that statute within the restraints which the high court of that particular political authority has laid down. To convict and punish a man under such circumstances would be anything but justice. It was with this spirit that Frazer J., said: "We ought, in any case, to proceed with great caution in reversing opinions heretofore pronounced by this court, and received and acted upon as settling the law, and especially when a rule of property would be overturned, and that would be made criminal, which had before been adjudged lawful." *Grubbs v. State,* 24 Ind. 295. It is respectfully submitted that the case of *State v. Williams,* above referred to, overruling *State v. Harper,* 6 S. C. 464, was clearly justifiable on the ground that the act committed was *malum in se.* The fact that *State v. Harper* had been decided only four years before, and that it alone was relied upon to support the doctrine of *stare decisis,* also tends to explain a proposition only paradoxically adverse to the *stare decisis* doctrine. If a man commits an act *malum in se,* then of course, unless the circumstances are very peculiar, there can be no valid objection to an overthrow of the doctrine as had been previously laid down, especially so when it is upheld by only one decision. For when an act is *malum in se,* the perpetrator must have been conscious of the fact that he was committing a crime. When a decision, or a line of decisions are adverse to a defendant and the present court is well satisfied that the principles of those decisions are wrong, and the fact is accentuated by being invoked by the defendant, even in his own

favor, the court should change the existing doctrine. Here there would be no vested rights overturned nor is anyone to suffer. The state does not care to punish under a line of erroneous decisions. It does not seek for revenge; and to suffer the accused to be pronounced guilty under decisions which should never have been the law, is against the spirit of Anglo-Saxon criminal law, where all doubtful advantages are given to a defendant. And while the reversal of a judicial decision is not *ex posto facto* law, as is intended in the constitutional prohibition, *Weber v. Rogers*, 188 U. S. 10, yet in spirit, such a reversal has so much the nature of a retroactive effect that it is unfair to have it operate in the ordinary case of crime merely *malum prohibitum*.

In conclusion, and it is advanced with respect, that the doctrine as laid down in *State v. Fulton*, ratifying *State v. Bell, ante*, was in the highest sense of the word a just and intelligent pronunciation of that type of fairness which should pervade the law; for while a rule which had operated was declared no law, yet the accused was allowed to defend under the abrogated rule—a rule under which this defendant might have acted upon advice of counsel—based on the law as set forth in the first opinion. For, as Lord Hardwicke says: "Certainty is the mother of repose, and therefore the law aims at certainty." *1 Dick*, 245. It is, therefore, respectfully submitted that where the accused has acted under a decision as laid down by the highest courts of that political sovereignty, and the accused is guilty of a crime merely *malum prohibitum*, and not of a crime *malum in se*, that the court in declaring that rule which had previously stood for law as no law, should allow a new trial under the abrogated rule, and thus in spirit carry out that basic principle, not only of Anglo-Saxon law, but of all law worthy of the name: *Stare decisis, et non, quieta movere*.

## RIGHT OF A LABOR UNION TO ENFORCE A STRIKE ORDER BY THE IMPOSITION OF A FINE.

The purpose of a labor union is to protect its members and to improve their condition by securing shorter hours of labor and a higher rate of wages. Great good has been accomplished along these lines and the working conditions of all classes of labor have been thus materially improved. That strikes may be called to accomplish this purpose is well established, and the usual method

of enforcing members to obey a strike order is by fining for disobedience. The right to impose such a fine is brought into question in the case of *L. D. Willcutt & Sons Co. v. Bricklayer's Benevolent and Protective Union, No. 3, et al.*, 85 N. E. 897. (Mass.)

The complainant is a corporation employing a large number of workmen. The defendants are two unincorporated associations and certain individuals as officers and members thereof. The question involved is whether or not an injunction will lie to prevent such an association from enforcing a strike against the complainant by fining such of its members as continue in its employ after the strike has been declared. A decision granting an injunction was rendered by a divided court of three to two.

Justice Sheldon filed a strong dissenting opinion, and when we consider the following quotations from the opinion of Justice Loring, it becomes evident that the decision was based upon the doctrine of *stare decisis* rather than upon the merits of the case itself: "For reasons stated in the opinion of Justice Sheldon, I should agree with the conclusion there reached were it not for the recent decision made by this court in *Martell v. White,* 185 Mass. 255," and later on he continues: "In my opinion, the decision in *Martell v. White* ought not to be overruled in the case at bar although it was wrong, provided laborers and labor unions will not suffer injustice from our standing by it. The evils which ensue from overruling a wrong decision where no injustice is involved in following it, are greater than those which come from standing by it." It is difficult to conceive of a wrong decision which does not involve an injustice to the person against whom such a decision is rendered.

The purpose of the doctrine of *stare decisis* is to produce certainty and stability in our jurisprudence, and should be conclusive when former decisions have recognized and established rules of interpretation with reference to which parties have entered into contractual or other legal relations. *Menge v. The Madrid,* 40 Fed. 677; *Treon v. Brown,* 14 Ohio 482. But in the present case it is not contended that the parties to the controversy had entered into any legal relations whatever, relying upon the doctrine of *Martell v. White, supra,* and that the rule of *stare decisis* should not be applied indiscriminately is well settled. "Infallibility is to be conceded to no tribunal. A legal principle to be well settled must be founded on sound reason." *Leavitt v.*

*Morrow,* 6 Ohio St. 71. "When a court comes to the deliberate conclusion that it has made a mistake, it is better that it frankly acknowledge its mistake and declare the true doctrine, as it should have done." *Hines v. Driver,* 89 Ind. 339.

The validity of by-laws authorizing the imposition of fines, to enforce members of a voluntary association to obey its rules, is so universally admitted that it is discussed in but few cases. *Brennan v. United Hatters,* 73 N. J. Law 729. In fact, the only cases in which their validity seems to be questioned are *Boutwell v. Marr,* 71 Vt. 1, and *Martell v. White, supra;* and in the latter case the decision was expressly based on the assumption that the fine imposed was "so large as to amount to moral intimidation or coercion," while the rule laid down in the present case is so broad as to include all fines regardless of amount. "All that is up for decision in the case at bar is that the imposition of a fine is the use of unlawful means."

The present case may be readily distinguished from *Quinn v. Leathem,* 1901 A. C. 495; *Reynolds v. Davis,* 198 Mass. 205, and others cited by the court, in that no contractual rights of the complainant are involved. It hired its men by the day and it might have discharged them or they might have left at the close of any day.

The court in the ruling opinion discussed the option which a member has to either leave the organization or abide by its rules, and makes the following comparison: "The highwayman, who presents his cocked pistol to the traveler and demands his purse under pain of instant death in case of refusal, offers his victim a choice. He may either give up his purse and live, or refuse and die. . . . And so the member of a labor union has the choice either to pay the fine or leave the union." It is difficult to see the analogy between the two cases: the organization has the undoubted right to expel a member. Has the highwayman the right to take the life of his victim?

The use of the injunction in labor disputes has been so extended in recent years that it threatens to seriously impair the efficiency of labor unions in the excellent work they are doing for the uplifting of the working classes.